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No. _____

Supreme Court, U.S.
FILED
OCT 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARSHALL P. SAFIR,

Petitioner,

—v.—

UNITED STATES LINES INC., UNITED STATES LINES and UNITED STATES LINES S.A., (formerly MOORE MCCORMACK LINES, INC.), LYKES BROS. STEAMSHIP CO. INC., AMERICAN PRESIDENT LINES LTD., FARRELL LINES INC., PRUDENTIAL LINES INC., PRUDENTIAL-GRACE LINES INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARSHALL P. SAFIR
271 Grand Central Parkway
Floral Park, New York 11005
(718) 225-0210

October 25, 1989

QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit, by its refusal to timely vacate a factually erroneous and procedurally inconsistent Clerk's Order of Dismissal of an appeal has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned a departure by the District Court for the Eastern District of New York as to call for an exercise of this Court's power of supervision.

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IN THE

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OCTOBER TERM, 1990

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UNITED STATES LINES INC., UNITED STATES LINES and UNITED STATES LINES S.A., (formerly MOORE MCCORMACK LINES, INC.), LYKES BROS. STEAMSHIP CO. INC., AMERICAN PRESIDENT LINES LTD., FARRELL LINES INC., PRUDENTIAL LINES INC., PRUDENTIAL-GRACE LINES INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Order of June 29, 1989 by the Court of Appeals is appended (A-2). The Orders of the District Court are appended (A3-A8). Other relevant opinions include *Safir* v. *U.S. Lines et al.*, 792 F.2d 19 (2nd Cir. 1986) *cert. denied*, 479 U.S. 1099 (1987); *Safir* v. *United States Lines et al.*, 616 F.Supp. 613 (EDNY 1985); *Safir* v. *Dole*, 718 F.2d 475 (D.C. Cir. 1983) *cert. denied*, 467 U.S. 1206 (1984) *rehearing denied*, 467 U.S. 1268 (1984); *Safir* v. *Klutznick*, 526 F.Supp. 921 (D.D.C. 1981). *In Re Marshall P. Safir*, 108 S.Ct. 496 (1987); *In Re Marshall P.*

Safir, 108 S.Ct. 788 (1988). *Safir* v. *ICC & CSX Corp.*, 831 F.2d 283 (2nd Cir. 1987) *cert. denied*, 109 S.Ct. 520 (1988).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment below was entered on June 29, 1989. This petition is filed in accordance with the terms of an extension of time granted by Justice Thurgood Marshall on September 18, 1989 (A-1).

STATEMENT OF THE CASE

On June 29, 1989 the Clerk of the Second Circuit Court of Appeals dismissed an appeal of a decision of the District Court for the Eastern District of New York in its Docket 89-7547 on grounds that the undersigned appellant had not complied with an Order of the Court of Appeals issued August 12, 1987 in regard to the Payment of a sanction of $5,000 in *Safir* v. *Interstate Commerce Commission and CSX Corp.*, 831 F.2d 283 (2nd Cir. 1987) *cert. denied*, 109 S.Ct. 111 (1988) rehearing denied 109 S.Ct. 520 (1988).

On July 11, 1989 applicant filed a Motion for Reconsideration of the dismissal order on grounds that the Clerk had made a mistake in that the sanction had been paid on December 9, 1988 and that the Court had been made aware of it immediately thereafter.

The Motion for Reconsideration was filed upon the instruction of the Clerk's Office as the Clerk stated that a Petition for Rehearing under Rule 40 of the Fed. Rules of App. Proc. (which would have tolled Rule 12 of this Court) was inappropriate. Nevertheless in spite of the obvious error and the Clerk's indication of prompt correction, the Court has not acted to reinstate the appeal of the final District Court Order of April 25, 1989 (A-3–A-5) as modified May 18, 1989 (A-6–A-8). In the interim, applicant's time for the filing of a petition for certiorari was running—absent the protection of Rule 40.

The delay in reinstating the appeal in Second Circuit Docket 89-7547 from the final order of the District Court rejecting the Safir Complaint against all of the above-named defendants "on the merits" has no worthy explanation because the Court has permitted a Safir appeal of another order of the District Court in the same action to go forward. This order is the subject of separate appeal Docket 89-7549. *See* Order of May 18, 1989 denying intervention by Safir in the Bankruptcy Court proceeding *In Re United States Lines and United States Lines (S.A.)* (A-9–A-11). *See also* Original Scheduling Order of June 7, 1989 in Second Circuit Docket 89-7549. (A-12).

In view of the uncertainty caused by the uncorrected Clerk's error in Docket 89-7547 and yet the permitted briefing of Docket 89-7549, appellant Safir moved the Court below for an enlargement of time to file his brief in Docket 89-7549 which was granted on July 19, 1989. (A-14).

Appellant's brief has been filed, as has the response of the appellees United States Lines Inc. and United States Lines S.A. (formerly Moore McCormack Lines Inc.) but the appeal of the denial of the merits of the Safir claims against all of the above-named defendants in 89-7547, which merits formed the basis of the secondary motion for bankruptcy court intervention in the USL case has not been reinstated as of this date.

The effect of the uncorrected erroneous dismissal of Docket 89-7547 is to moot Docket 89-7549.

REASONS FOR GRANTING THE WRIT

Because there has been no action on the anomaly by the Court below in spite of the extension granted in Application 211 and the time for the filing of this petition will have run, there is only one conclusion to draw from the reluctance of the Court of Appeals to correct its record—the review of the District Court errors in denying the petitioner's new meritorious claims would be less acceptable than a continuation of the litigation on the issue of the Clerk's uncorrected error.

This Writ should be granted because review of the merits of petitioner's claims should not be further suspended by the use of such pretext.

Petitioner is aware of the precedent that this Court will not review on certiorari issues which have not been passed upon by the Court of Appeals. Where review of such hornbook principles as the third party beneficiary rule in actions for breach of contract are avoided in the fashion as set forth here, petitioner prays that an exception will be considered in this case or that alternatively, relief be granted in the nature of a writ under 28 U.S.C. § 1651(a).

Since the Second Circuit decision in *Safir* v. *United States Lines et al.*, 792 F.2d 19 (2nd Cir. 1986), *cert. denied*, 479 U.S. 1049 (1987), this petitioner has endeavored to establish a meritorious claim based not on statute but in quasi-contract to satisfy the District Court under the injunctive restraint imposed on him. The judgment of *Safir* v. *Klutznick*, 526 F. Supp. 921 (D.D.C. 1981) as modified and affirmed in *Safir* v. *Dole*, 718 F.2d 475 (1983) created a constructive trust over subsidy contract payments to the appellees herein which payments were made in violation of their subsidy contracts. When this litigation began, eight ship lines were viable corporations. In the past 10 years that number has been reduced to three who are solvent. These are American President Lines, Lykes Bros. and Farrell Lines Inc. who would in varying degrees be able to satisfy the imposition of the trust. United States Lines and Presidential Lines are bankrupt.

The Court in *Safir* v. *United States Lines Inc.*, *supra*, held that the owner of an unsubsidized ship line did not have an implied private right of action under the Merchant Marine Act 1936, section 810 (46 U.S.C. § 1227). The Court specifically avoided foreclosure of a new claim under another basis for recovery.

The Complaint filed in October 1987 set forth two claims which have no similarity to statutorily implied private right of action. Count I of the Complaint is a conspiracy claim under the Civil Rights Act of 1871, 42 U.S.C. § 1985(3) where recov-

ery of damages is authorized by law. Count I sets forth in some detail the foundation on which the finding of the Secretary of Commerce was based. Government officials were implicated in the conspiracy by which the respondents received moneys to which they were not entitled.

Count II of the Complaint is not based on any statute—sounding instead in contract. Any unsubsidized ship operator under the American Flag was *per se* a third party beneficiary of the carriers' subsidy contracts as the wording of Section 810 is incorporated in each and every such contract. All the rules of the Restatement Second, Contracts—Chapter 14 "Beneficiaries" apply to government contracts under § 313(1). Safir qualifies not as an incidental, but as a direct intended beneficiary under § 302(1). The prohibition of predatory acts against unsubsidized competitors was a condition of performance of the Contract under § 303, the promise of a contract created a duty in the promissor to perform the promise of 46 U.S.C. § 1227 and the intended beneficiary may enforce that promise under § 304. Either the promissee or the beneficiary may maintain a suit for specific enforcement of a duty owed to an intended beneficiary under § 307, and it is not essential to the creation of a right to an intended beneficiary that he be named when the contract containing the promise was made—§ 308.

Safir had a property right in the promise held out by Congress and implemented by a Maritime Administration contract that if he entered into competition he would be protected from subsidized predation by the contract terms mandated by law.

> The link between third party beneficiary rule and public law question about private rights of action is their common concern with an individual's access to some beneficial interest in the thing be it a statute or a contract.
>
> Waters "The Property in the Promise" HLR Vol 98:1109, 1114 (1985).

The District Court not only refused to state the grounds why the claims had no merit but indeed refused to acknowledge the

existence of the 1987 Complaint which the Court permitted the Clerk to accept for filing on October 14, 1987.

This affected petitioner in two ways. First, the refusal to recognize the existence of the 1987 Complaint makes a controlling difference in the cognizability of maritime lien claims against all of the named defendants under a change in the law in 1988. Unless appellant can relate his claims back to an existing suit by amendment under Rule 15(c) FRCP, the claims are a nullity.

The Ship Mortgage Act of 1920 (46 U.S.C. § 911 et seq.) and specifically the wording of § 953(a)(1) has been repealed by the 1988 recodification, Public Law 100-170, 102 STAT. 4735 effective January 1, 1989. However, the Savings Clause states: "except that the repeal does not affect any civil action filed before that date." The new codification 46 U.S.C. § 31301 et seq. delimits a preferred maritime lien to a lien on a single vessel and confines maritime lien status only to persons providing necessaries to such vessel. §§ 31341, 31342. Contrast *Archawski* v. *Hanioti*, 350 U.S. 532 (1955).

Secondly, the refusal to recognize the existence of the 1987 complaint would also nullify the constructive trust because while that claim based on the *Klutznick* judgment of 1981 was filed within the six-year statute of limitations, any "current" new action as characterized by Judge Nickerson would be jurisdictionally barred.

The constructive trust claim is in immediate jeopardy based on the prospective disbursement of $24,000,000 on the effective date of a Plan of Reorganization of US Lines and US Lines S.A. to creditors other than this petitioner. The cash on hand of the debtors is the admitted surplus from the sale of Lancer vessels *in rem* to satisfy the mortgage guarantee obligations of USL to the Maritime Administration under 46 U.S.C. §§ 1273-1275. The debtor claims that the surplus over the government claim is an asset of the estate of USL. If the appellant's claim based on the judgment as to liability of *Safir* v. *Klutznick* is valid and the finding of government complicity in the illegal action in *Safir* v. *Dole, supra*, as detailed in Count I of the Complaint further establishes the wrongful nature of the unjust enrichment to

USL, USLSA (as well as the other defendants), funds held in the jurisdiction of the Bankruptcy Court are subject to turnover to this petitioner under 11 U.S.C. § 541(d).

Therefore, when and if the Plan becomes effective, disbursement by the USL Reorganization Trust to other creditors would represent an insuperable morass of new litigation to trace the funds into the far-flung recipients. It was to protect this constructive trust claim as set forth in Counts I and II of the Complaint that petitioner moved for leave to intervene in the bankruptcy proceeding by motion to the district court. That protection is denied by the Second Circuit refusal to act on the Motion for Modification.

CONCLUSION

The inconsistency of the Court's willingness to accept the $5,000 sanction payment in the review of denial of intervention in the Bankruptcy Court while refusing to accept the existence of that payment to review the denial of the Safir contract claims on their merits is as mystifying as it is unfair.

Due process is only possible where the District Court is required to recognize the existence of the 1987 filing of the complaint as the basis for a 1989 decision on its merits and the Court of Appeals is required to recognize the cancelled check in payment of the $5000 sanction as its legal obligation to review that error.

MARSHALL P. SAFIR
271 Grand Central Parkway
Floral Park, New York 11005
(718) 225-0210

October 25, 1989

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-211

MARSHALL SAFIR,

Petitioner,

v.

UNITED STATES LINES, INC., ET AL.

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 25, 1989.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of September, 1989.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

89-7547

Filed June 29, 1989

MARSHALL P. SAFIR,

Plaintiff-Appellant,

—v.—

UNITED STATES LINES, INC., LYKES BROS. STEAMSHIP CO., INC., AMERICAN PRESIDENT LINES, LTD., FARRELL LINES, INC., AMERICAN EXPORT LINES, INC., PRUDENTIAL LINES, INC., PRUDENTIAL-GRACE LINES, INC.,

Defendants-Appellees.

The above referenced notice of appeal was filed in the district court on June 2, 1989, and received in this court for docketing on June 6, 1989. Because the appellant, Marshall P. Safir, has failed to demonstrate compliance with the sanctions set forth in an order entered on August 12, 1987, in *In Re: Marshall P. Safir, 87-3007 and Marshall P. Safir v. Interstate Commerce Commission, 87-4037*, the appeal filed on June 2, 1989, is hereby dismissed, pursuant to that order.

Dated: New York, New York
June 29, 1989

So ordered:

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith, Clerk

UNITED STATES COURT OF APPEALS

EASTERN DISTRICT OF NEW YORK

85 C 0864

Filed May 18, 1989

MARSHALL P. SAFIR,

Plaintiff,

—against—

UNITED STATES LINES, INC., LYKES BROS. STEAMSHIP CO., INC., MOORE MCCORMACK LINES, INC., AMERICAN PRESIDENT LINES, INC., FARRELL LINES, INC., AMERICAN EXPORT LINES, INC., PRUDENTIAL LINES, INC., PRUDENTIAL-GRACE LINES, INC.,

Defendants.

MEMORANDUM AND ORDER

MARSHALL P. SAFIR
Floral Park, New York
plaintiff *pro se*

WALTER, CONSTON & SCHURTMAN, P.C.
(William Schurtman, Esq. and Gregory F. Hauser, Esq., of counsel)
New York, New York
FOLEY, HOAG & ELIOT
(Verne W. Vance, Jr., Esq., of counsel)
Boston, Massachusetts
for defendants Farrell Lines, Inc. and American Export Lines, Inc.

KOMINERS, FORT, SCHLEFER & BOYER
(T.S.L. Perlman, Esq., and William H. Fort, Esq., of counsel)
Washington, D.C.
for defendants Lykes Bros. Steamship Co., Inc.

HAIGHT, GARDNER, POOR & HAVENS
(John W. McConnell, Jr., Esq., of counsel)
Washington, D.C.
for defendants United States Lines, Inc. and United States Lines (S.A.), Inc. (formerly Moore McCormack Lines, Inc.)

HAIGHT, GARDNER, POOR & HAVENS
(Richard G. Ashworth, Esq., of counsel)
New York, New York
for defendants Lykes Bros. Steamship Co., Inc., United States Lines, Inc. and United States Lines (S.A.), Inc. (formerly Moore McCormack Lines, Inc.)

SHEA & GARDNER
(Robert T. Basseches, Esq., and William R. Hanlon, Esq., of counsel)
Washington, D.C.
HILLS, BETTS & NASH
New York, New York
for defendants American President Lines, Ltd.

DAVID P. HOWE, ESQ.
New York, New York
for defendants Prudential Lines, Inc. and Prudential-Grace Lines, Inc.

NICKERSON, *District Judge*

Plaintiff moves to vacate, alter or amend an order of this court dated September 13, 1985 under Rule 59(e) of the Federal Rules of Civil Procedure.

In an opinion dated May 27, 1986, the Court of Appeals for the Second Circuit modified this court's September 13, 1985 order to provide that plaintiff "is prevented only from commencing additional federal court actions relating in any way to defendants' pricing practices or merchant marine subsidies during the 1965-1966 period without first obtaining leave of the district court." *Safir* v. *United States Lines, Inc.*, 792 F.2d 19, 25 (2d Cir. 1986). The court's order is modified accordingly.

Plaintiff further seeks leave to file another action against defendants' arising out of the same circumstances as the earlier suit. He has failed to show why his current claims are different from the earlier action or why they have any merit. Leave to file the action is therefore denied.

The court's order of September 13, 1985 is modified in accordance with the Court of Appeals decision of May 27, 1986. Plaintiff's motions are denied. So ordered.

Dated: Brooklyn, New York
April 25, 1989

/s/ EUGENE H. NICKERSON
Eugene H. Nickerson,
U.S.D.J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

85 C 0864

Filed May 18, 1989

MARSHALL P. SAFIR,

Plaintiff,

—against—

UNITED STATES LINES, INC., LYKES BROS. STEAMSHIP CO., INC., MOORE MCCORMACK LINES, INC., AMERICAN PRESIDENT LINES, INC., FARRELL LINES, INC., AMERICAN EXPORT LINES, INC., PRUDENTIAL LINES, INC., PRUDENTIAL-GRACE LINES, INC.,

Defendants.

MEMORANDUM AND ORDER

MARSHALL P. SAFIR
Floral Park, New York
plaintiff *pro se*

WALTER, CONSTON & SCHURTMAN, P.C.
(William Schurtman, Esq. and Gregory F. Hauser, Esq., of counsel)
New York, New York
FOLEY, HOAG & ELIOT
(Verne W. Vance, Jr., Esq., of counsel)
Boston, Massachusetts
for defendants Farrell Lines, Inc. and American Export Lines, Inc.

KOMINERS, FORT, SCHLEFER & BOYER
(T.S.L. Perlman, Esq., and William H. Fort, Esq., of counsel)
Washington, D.C.
for defendants Lykes Bros. Steamship Co., Inc.

HAIGHT, GARDNER, POOR & HAVENS
(John W. McConnell, Jr., Esq., of counsel)
Washington, D.C.
for defendants United States Lines, Inc. and United States Lines (S.A.), Inc. (formerly Moore McCormack Lines, Inc.)

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(Richard G. Ashworth, Esq., of counsel)
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for defendants Lykes Bros. Steamship Co., Inc., United States Lines, Inc. and United States Lines (S.A.), Inc. (formerly Moore McCormack Lines, Inc.)

SHEA & GARDNER
(Robert T. Basseches, Esq., and William R. Hanlon, Esq., of counsel)
Washington, D.C.
HILLS, BETTS & NASH
New York, New York
for defendants American President Lines, Ltd.

DAVID P. HOWE, ESQ.
New York, New York
for defendants Prudential Lines, Inc. and Prudential-Grace Lines, Inc.

NICKERSON, *District Judge*

Plaintiff moves to vacate, alter or amend an order of this court dated April 25, 1989 under Rule 59(e) of the Federal Rules of Civil Procedure.

In an opinion dated April 25, 1989 the court modified an earlier order to provide that plaintiff "is prevented only from commencing additional federal court actions relating in any way to defendants' pricing practices or merchant marine subsidies during the 1965-1966 period without first obtaining leave of the district court."

The court then denied plaintiff leave to file another action against defendants arising out of the same circumstances as the earlier suit.

Plaintiff has still failed to show why his current claims are different from the earlier action or why they have any merit.

Plaintiff's motion is denied. So ordered.

Dated: Brooklyn, New York
May 12, 1989

/s/ EUGENE H. NICKERSON
Eugene H. Nickerson,
U.S.D.J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

85 C 0864

Filed May 18, 1989

MARSHALL P. SAFIR,

Plaintiff,

—against—

UNITED STATES LINES, INC., LYKES BROS. STEAMSHIP CO., INC., MOORE MCCORMACK LINES, INC., AMERICAN PRESIDENT LINES, INC., FARRELL LINES, INC., AMERICAN EXPORT LINES, INC., PRUDENTIAL LINES, INC., PRUDENTIAL-GRACE LINES, INC.,

Defendants.

MEMORANDUM AND ORDER

MARSHALL P. SAFIR
Floral Park, New York
plaintiff *pro se*

WALTER, CONSTON & SCHURTMAN, P.C.
(William Schurtman, Esq. and Gregory F. Hauser, Esq., of counsel)
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New York, New York
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(Robert T. Basseches, Esq., and William R. Hanlon, Esq., of counsel)
Washington, D.C.
HILLS, BETTS & NASH
New York, New York
for defendants American President Lines, Ltd.

DAVID P. HOWE, ESQ.
New York, New York
for defendants Prudential Lines, Inc. and Prudential-Grace Lines, Inc.

NICKERSON, *District Judge*

Before the court is plaintiff's application seeking leave to file a motion to intervene in a proceeding before the Bankruptcy Court for the Southern District of New York.

Plaintiff's application is denied. So ordered.

Dated: Brooklyn, New York
May 12, 1989

/s/ EUGENE H. NICKERSON
Eugene H. Nickerson,
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed June 7, 1989

Docket No. 89-7549

SAFIR v UNITED STATES LINES

CIVIL APPEALS SCHEDULING ORDER # ONE
MAKE ALL TELEPHONE INQUIRIES TO
(212) 791-9189/0105

Noting that Marshall P. Safir, appellant pro se, has filed a Notice of Appeal, and being advised as to the progress of the appeal,

IT IS HEREBY ORDERED that the district court shall be responsible for filing the record on appeal on or before June 20, 1989.

IT IS FURTHER ORDERED that appellant's brief and appendix be filed on or before July 20, 1989. If appellant's brief does not exceed 10 pages, it may be filed in memorandum form.

IT IS FURTHER ORDERED that the appellee's brief be filed on or before August 21, 1989. If the appellee's brief does not exceed 10 pages, it may be filed in memorandum form.

IT IS FURTHER ORDERED that 10 copies of each brief or memorandum shall be filed with the Clerk; however, the filing of a lesser number may be permitted upon application.

IT IS FURTHER ORDERED that the appellee may, without further order of the court, file 10 copies of an appendix to its brief, or 10 copies of an attachment to its memorandum.

IT IS FURTHER ORDERED that the argument of the appeal shall be heard as early as the week of Sept. 11, 1989. The appellant pro se and opposing counsel and parties should immediately advise the Clerk by letter of the dates thereafter that they are unavailable for oral argument. The time and place of oral argument shall be separately noticed by the Clerk to the appellant, pro se, and all counsel.

IT IS FURTHER ORDERED that in the event of default by appellant in timely filing the appellant's brief or memorandum and appendix, or upon default by appellant regarding any other provision of this order, the appeal may be dismissed forthwith without further notice and without a motion therefor.

IT IS FURTHER ORDERED that if the appellee fails to file a brief or memorandum within the time directed by this order, the appellee shall be subject to such sanctions as the court may deem appropriate.

ELAINE B. GOLDSMITH
Clerk

/s/ RAMBERTO RODRIGUEZ
Ramberto Rodriguez,
Deputy Clerk

Date: June 7, 1989

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89-7549

Filed July 19, 1989

SAFIR v. U.S. LINES

ORDER

Brief statement of the relief requested:

Extension of time to file brief.

IT IS HEREBY ORDERED that the motion for extension of time is granted only to the extent that the record on appeal shall be filed on or before appellant's brief and joint appendix shall be filed on or before August 21, 1989, the appellee's brief shall be filed on or before September 21, 1989 and the appeal shall be ready to be heard as early as the week of October 9, 1989.

ELAINE B. GOLDSMITH, *Clerk*

19 July 1989
Date

By: /s/ MARCIA C. MOHAN
Supervisory Staff Attorney